***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

DUB-ISSUE
(2)
11-988

# BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,002

UNITED STATES OF AMERICA

Appellee,

v.

VINCENT B. WALKER,

Appellant,

Appeal From Judgment of the United States
District Court for the District of Columbia



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May 18, 1970

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# BRIEF FOR APPELLANT

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## THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in refusing to suppress as evidence at the trial capsules containing narcotic drugs taken from the possession of the defendant, as the product of an illegal search and seizure incident to a warrantless arrest without probable cause, in light of the insufficiency of the evidence and the discrepencies and contradictions in the testimony of the arresting officer.

2. Whether the Trial Court erred in refusing to permit the defendant to cross-examine an expert Government witness, a police officer formerly assigned to the narcotics section, on the length of time it would take an addict to use the number of capsules taken from the person of the defendant, going to the question whether possession was for personal use or for dispensing and distribution.

3. Whether the conviction on Count 3 of the indictment based upon a presumption from the possession of cocaine was invalid, and the judgment of conviction on Count 3 must accordingly be vacated.

The pending case has not previously been before this Court.

## REFERENCES TO RULINGS

The Trial Court denied the defendant's motion to suppress at page 18 of the transcript of the hearing on the motion (App. 31)*, and denied a renewal of the motion to suppress at page 55 of the transcript of trial (App. 65). The Trial Court refused to permit interrogation on the number of capsules used by an addict at page 43 of the transcript of trial (App.56). The Trial Court denied motions to dismiss the indictment and for judgment of acquittal at pages 55-56 of the transcript of trial (App. 65-66).

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* The references to "App." are to circled numbers on the pages of the transcripts which have been reproduced.

## STATEMENT OF THE CASE

The defendant Vincent B. Walker was indicted on July 8, 1969, in Grand Jury No. 1110-69, Criminal No. 1091-69, in the United States District Court for the District of Columbia, on three counts: purchasing, dispensing, and distributing 36 capsules containing heroin not in the original stamped package, in violation of 26 U.S.C. § 4704(a) (Count 1); receiving, concealing, and facilitating the concealment of the 36 capsules containing heroin, in violation of 21 U.S.C. § 174 (Count 2); and purchasing, dispensing, and distributing 16 capsules containing cocaine not in the original stamped package, in violation of 26 U.S.C. § 4704(a) (Count 3).

A motion to suppress evidence was denied following a hearing before United States District Judge John Lewis Smith, Jr., on November 7, 1969, and, after motions to suppress, to dismiss the indictment, and for judgment of acquittal were denied, the defendant was convicted on all three counts following a jury trial on December 18, 1969, before District Judge Smith. On February 11, 1970, the defendant was sentenced to a term of imprisonment of one to three years on Counts 1 and 3, and to six years on Count 2, the sentences to run concurrently. A notice of appeal was filed on that same date, and the defendant has been permitted to continue to proceed in forma pauperis. The record was filed in this Court on March 10, 1970, and counsel (who represented the defendant at trial by appointment of the United States District Court) was appointed on March 17, 1970, to represent the defendant on appeal. The defendant's time for filing his brief was extended by this Court for a period of 60 days from the date of appointment of counsel.

Essential facts relating to the circumstances under which the defendant was arrested and searched, and the capsules taken from his possession, are in dispute (the defendant avers that there are material discrepencies in the arrest reports of the police officer and in his testimony at preliminary hearing, before the grand jury, at the hearing on the motion to suppress, and at trial). To the extent that they are not in dispute, the testimony of the arresting officer, Officer Samuel Williams, indicates that he was assigned to the K-9 Corps of the Metropolitan Police Department, and while in uniform (Sup.H. 6, App. 19)* was patrolling the area between East Capitol Street and C Street, and between Seventh and Fifteenth Streets, on a Saturday evening, April 26, 1969, about 9:00 p.m. (Sup.H. 3-4, App. 16-17). He had been with the Police Department for 11 years (Sup.H. 10, App. 23), but had never been on the Narcotics Squad (Sup.H. 9-10, App. 22-23). He had never walked that beat before, but he was familiar with the area (Sup.H. 11, App. 24), and had information that this was an area of high crime and vice (Sup.H. 7, 12, App. 20, 25). He devoted most of his working time to the area of Fifteenth and East Capitol Streets, because he observed a large crowd of men gathering around that corner (Sup.H. 4, App. 17).

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*Transcript references are as follows:

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|---|---|
| P.H. | Preliminary Hearing, May 7, 1969. |
| G.J. | Grand Jury, June 19, 1969. |
| Sup.H. | Hearing on Motion to Suppress, November 7, 1969. |
| Tr. | Trial, December 18, 1969. |

For the convenience of the Court, the pages have been numbered consecutively and circled.

While standing at a wall at the intersection, Officer Williams observed the defendant standing in a doorway shaking something out of a small manila-colored envelope into his hand (Sup.H. 4, App. 17). Another person was standing facing the defendant (Tr. 24, App. 42). Neither the defendant or the other person was known to the officer (Sup.H. 7, App. 20). The other person saw the officer, turned, and went away (Tr. 17-18, App. 35-36), while the defendant put the envelope into his right coat pocket and walked towards the officer (Sup.H. 5, App. 18), carrying a coco cola bottle and a beer can (Tr. 18, App. 36). The officer stopped the defendant, and said he would like to talk to him (Ibid.). The defendant asked whether there was anything wrong, and threw the beer can into a trash can (Ibid.). When the officer asked what was in his right coat pocket, the defendant pulled out some matches and crumpled up cigarettes, then stopped and asked what this was all about (Ibid.). A crowd of about 25 persons started to gather around (P.H. 4, App. 3; Sup.H. 5, App. 18). The police officer told the defendant he was under arrest, and placed handcuffs on him behind his back (Tr. 18, App. 36). The officer arrested him "[f]or having in his possession narcotics" (Tr. 31, App. 49). At that time (ibid.) or when the wagon came (Sup.H. 5-6, App. 18-19), the officer reached into the defendant's right pocket, and found two envelopes containing capsules.

The capsules were taken to an officer of the Metropolitan Police Department, who had been assigned to the narcotics section for two and one-half years, to conduct a preliminary test for the presence of narcotics (Tr. 36, App. 54). On cross-examination, the officer testified that he was familiar with the habits of narcotic addicts, but on objection by Government

counsel, was not permitted to testify, based on his experience, how long it would take an addict to use the 36 capsules of heroin (Tr. 43, App. 56).

On chemical analysis, the 36 capsules were found to contain ten per cent heroin hydrochloride, or 217 milligrams in 35 capsules (Tr. 47), App. 58), and the other sixteen capsules were found to contain twelve per cent cocaine hydrochloride, or 177 milligrams in 15 capsules (Tr. 49, App. 60). The Government's expert chemist witness testified that heroin hydrochloride is a hydrochloride of heroin alkaloid, which is a derivate of morphine, which is the principal alkaloid found in opium (Tr. 47, App. 58). Morphine is sometimes administered as a medicine in the United States (Tr. 54, App. 64). It is not possible to determine from chemical analysis whether the heroin hydrochloride is made in the United States or outside of the United States (Tr. 53-54, App. 63-64).

At the hearing on the motion to suppress evidence, the defendant offered to call an investigator with the Legal Aid Agency to testify that he had interviewed the police officer two months before the hearing, and that the officer had told him (1) that the officer did not know what the "something" was that the defendant was seen shaking into his hand, and (2) that the officer had never worked or had any experience in dealing with narcotics (Sup.H. 9-10, App. 22-23). The following colloquy then occurred (Sup.H. 10, App. 23):

> MR. FORREST [counsel for the defendant[: If Your Honor please, the investigator is available and on telephone call. I would like to call him because of the testimony of the officer.

> MR. WOLL [Assistant United States Attorney, counsel for the Government[: Well, Your Honor, I would assume that this is for some manner of impeachment. The officer denies that he made these statements and I assume that the Legal Aid person would come and say yes, this is my report.
>
> THE COURT: I am concerned only with probable cause. I will accept your statement as given without hearing from the witness."

## SUMMARY OF ARGUMENT

1. Contradictions in the testimony of a witness on a motion to suppress evidence raise questions of credibility going to the issue of probable cause for an arrest without a warrant. Jackson v. United States, 122 U.S.App.D.C. 324, 353 F.2d 862 (1965); Rouse v. United States, 123 U.S. App.D.C. 348, 359 F.2d 1014 (1966). In this case, every operative fact in the testimony of the arresting police officer going to the issue of probable cause was contradicted by other statements of the same police officer. The credibility of the arresting officer was so seriously impaired, as a consequence, that the residual uncontradicted evidence -- in essence, that the defendant was observed in a doorway shaking something into his hand from a small manila-colored envelope-- was insufficient to show probable cause to support a warrantless arrest, and a search and seizure incidental thereto.

2. The Trial Court erred in refusing to permit the defendant's counsel to cross-examine a Government expert witness on the length of time it would take an addict to use 36 heroin capsules, to permit the jury to find that the capsules constituted one day's supply, cf. Watson v. United States (U.S.App.D.C. No. 21,186, December 13, 1968, [illegible], rehearing en banc pending), slip opinion, p. 1, and to conclude that the capsules were intended for the defendant's own use (itself not a crime), and not for dispensing or distribution as charged.

3. Under the doctrine of Turner v. United States, --- U.S. --- (No. 190, January 20, 1970), decided after the trial in this case, the jury could not find the defendant guilty under Count 3 of the indictment of purchasing, dispensing, or distributing cocaine as a presumption from the bare fact of possession of a small quantity of cocaine. Under the recent decision of this Court in United States v. Hooper (U.S.App.D.C. No. 22,545, March 6, 1970), it would appear appropriate that the judgment of conviction entered under Count 3 be vacated, whatever disposition is made of other matters on appeal in this proceeding.

## ARGUMENT

### I. The Trial Court Erred in Refusing to Suppress as Evidence Narcotic Capsules Seized Without Probable Cause, in Light of the Insufficiency of the Evidence and Discrepancies in the Testimony of the Arresting Officer

The Fourth Amendment to the Constitution of the United States protects against violation the right of the people to be secure in their

persons against unreasonable searches and seizures. Rule 41(e) of the Federal Rules of Criminal Procedure provides that a person aggrieved by an unlawful search and seizure may move to suppress for the use as evidence anything so obtained on the ground that the property was illegally seized without a warrant.

The test whether a search and seizure is reasonable is whether there existed probable cause for the arrest and search and seizure. It has been said that probable cause for the search and seizure without warrant by police officers exists where "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). Since the time of Chief Judge Marshall, at least, it has come to mean less than evidence which would justify condemnation or conviction, but more than bare suspicion. Brinegar v. United States, 338 U.S. 160, 175 (1949). It is important that this standard be strictly enforced, and good faith on the part of the arresting officers will not be enough. Henry v. United States, 361 U.S. 98, 102 (1959).

There is no mathematical formula to test whether probable cause was present in a particular case. As this Court had recent occasion to note in Hinton v. United States (U.S. App. D.C. No. 22,068, October 14, 1969), slip opinion, pp. 3-4 (footnote citations omitted):

> "The problem here is one of probable cause for appellant's arrest, a requirement that mediates between the personal right

> to security from arbitrary intrusions by the police and the practical need to allow police officers reasonable play for their experience in judging actions and situations signaling the commission of crime. And within these bounds, the elements of finding of probable cause are as varied as encounters between citizens and police; seldom does a decision in one case handily dispose of the next."

In the present case, the only evidence disclosing the facts and circumstances of the arrest is contained in the statements of the arresting police officer on seven different occasions: (1) a case report submitted to the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs: (2) a report to the Metropolitan Police Department, on P.D. Form 163; (3) testimony at preliminary hearing, May 7, 1969; (4) testimony before the grand jury, June 19, 1969; (5) an interview by an investigator of the Legal Aid Agency, August 12, 1969; (6) testimony at a hearing on a motion to suppress evidence, November 7, 1969; and (7) testimony at trial, December 18, 1969.

The most remarkable aspect of these statements is that the arresting officer contradicted himself or made inconsistent statements on <u>every one</u> of the operative facts which might be considered to go toward supporting probable cause, while a considerable number of the elements often used to show probable cause were here absent:

| ELEMENT | IN SUPPORT OF PROBABLE CAUSE | AGAINST PROBABLE CAUSE |
|---|---|---|
| 1. Prior information or knowledge of defendant | | Both the defendant and the person with whom he was engaged was unknown to the police officer (Sup.H. 7, App. 20) |
| 2. Prior information or knowledge of the offense | The officer used to live in the general vicinity and was quite familiar with the area (Sup.H. 11, App. 24). He was told to walk that beat because of the high crime and vice in the area. (Sup.H. 7, 12, App. 20, 25). | The officer had never walked that beat previously (Sup.H. 11, App. 24). The types of crime were "a lot of street robberies and a lot of pocketbook snatchings and yokings and this type of offenses and this is basically what I was told" (Sup.H. 12, App. 25) (note no reference to narcotics). |
| | There was "general knowledge that kids that went to Eastern High School got a lot of narcotics from that little restaurant across the street from Eastern High School" (Sup.H. 12, App. 25). | Eastern High School was on Seventeenth Street (Sup.H. 12, App. 25), two blocks away. The restaurant was in no way involved in the arrest. The arrest was made on Saturday evening, when the school was closed (Sup.H. 17, App. 30). |
| | (After continued questioning by Government counsel, whether he had narcotic information in that area on that night) "Well, I heard from friends of mine that were in the narcotics field that at the pool hall there at Fifteenth Street and East Capitol was also a lot of -- at the pool hall there was a lot of business there and I had that in my mind also as I walked my beat" (Sup.H. 13, App. 26). | Only 6 pages before, the officer testified, in response to a question by defendant's counsel whether he had any information that any narcotic dealings were taking place at the corner:<br>A I heard that it was a lot of vice that went on in that corner and to pay strict attention to it.<br>Q But you had no specific information with respect to this? |

| ELEMENT | IN SUPPORT OF PROBABLE CAUSE | AGAINST PROBABLE CAUSE |
|---|---|---|
| | | A No, sir. My assignment was there and I was there because it was a high crime area. That is the reason that I was there in that vicinity." (Sup.H. 7, App. 20) (note that no reference to the pool hall is made in connection with the arrest of defendant). |
| 3. Narcotics experience of officer | The officer testified he had made numerous narcotics arrests on different assignments (Sup.H. 13, App. 26). | The officer had never been in the Narcotics Squad (Sup.H. 9-10, App. 22-23). A Legal Aid investigator would have testified that the officer said he had never worked or had any experience in dealing with narcotics; the officer denied the statement (Sup.H. 10, App. 23). |
| 4. Opportunity to observe (distance from defendant) | At trial, the officer states he saw defendant when he was 5 to 10 feet from him (Tr. 17, App. 35), or 5 to 8 feet (Tr. 24, App. 42). The officer doubted very seriously, and was pretty positive, it could not have been 15 feet (Ibid.) | In a narcotics report, the officer stated he was about 15 feet from the two subjects (Tr. 28, App. 46); in the preliminary hearing, 15 to 20 feet (P.H. 6-7, App. 5-6); before the grand jury, 15 feet (G.J. 2, App. 11). |

| ELEMENT | IN SUPPORT OF PROBABLE CAUSE | AGAINST PROBABLE CAUSE |
|---|---|---|
| 5. Place of observation | The officer took a position against the wall, then saw the defendant (Sup.H. 4, App. 17); had come to a pause when he observed the defendant (Tr. 17, App. 35). | At preliminary hearing, the officer indicated he had walked 20 yards along a building when he saw the defendant (P.H. 4, App. 3). Before the grand jury, he testified he was approaching the defendant when the other person saw him (G. J. 2-3, App. 11-12). |
| 6. Action of defendant | Before the grand jury and at the suppression hearing, the officer testified he saw the defendant shaking some capsules out of an envelope into his own hand (G.J. 2, App. 11; Sup.H.13-14, App. 26-27), and repeated it at trial (Tr. 17, App. 35). | On four other occasions the officer testified only that he saw defendant shake "something" out of the envelope--in the narcotics report (Tr. 27-28, App. 45-46); in the police report (Tr. 28, App. 46); at the preliminary hearing (P.H. 4, App. 3); and in an interview with a Legal Aid investigator, who would have testified that the officer stated he did not know what that "something" was (Sup. H. 9, App. 22). |
| 7. Type of package as container | At the suppression hearing, the officer testified the envelope was a two inch by one inch manila-colored envelope that most narcotic people use; it was the standard envelope narcotics people use, and he had never seen an envelope of this type purchased at a store (Sup. H. 4, 13; App. 17, 26) | At trial, the officer again said that the envelope was the standard color and size used in narcotic traffic, but admitted he would not say that envelopes like them were used only in narcotics traffic, and he was sure that any citizen could buy envelopes like that in an ordinary commercial stationery store (Tr. 35, App. 53). Concerning the nature of the container, see the text of this brief infra. |

| ELEMENT | IN SUPPORT OF PROBABLE CAUSE | AGAINST PROBABLE CAUSE |
|---|---|---|
| 8. Position relative to other person | At trial, the officer testified the defendant and the other person were facing each other (Tr. 24, App. 42). | At the suppression hearing, the officer testified the other person was right behind defendant, and looking over his shoulder (Sup. H. 14, App. 27). |
| 9. Whether money passed | | The officer acknowledged he saw no money pass between the defendant and the other person (Tr. 31, App. 49). |
| 10. Whether anything passed | At the suppression hearing, the officer testified that the defendant "was handing" what was in his hand to the other person (Sup.H. 4-5, App. 17-18). At trial, he testified the defendant was "intending to give "the capsules to the other person (Tr. 17, App. 35). | On further cross-examination at the suppression hearing, the officer testified:<br>Q Now, you stated that the defendant was holding this envelope and was shaking something out of it?<br>A Yes.<br>Q Into what was he shaking it?<br>A Into his hand.<br>Q His own hand?<br>A Yes.<br>Q* * *Now, did you see the defendant hand anything to this man?<br>A No. The other guy saw me * * *."<br>(Sup.H. 14-15, App. 27-28).<br>Q You said that the defendant shook the pills into his own hand. You never actually saw the defendant give the other person anything?<br>A No,he didn't take it. He walked away when he saw me."<br>Sup.H. 16, App. 29). |

| ELEMENT | IN SUPPORT OF PROBABLE CAUSE | AGAINST PROBABLE CAUSE |
|---|---|---|
| | | At the trial he testified:<br>Q And as I understand your testimony, the defendant was placing something or capsules in his own hand?<br>A That is correct.<br>Q And at no time did you see him, give anything to the other person?<br>A He didn't give anything."<br>(Tr.31-32, App. 49-50). |
| 11. Attempt at flight --the other person | At times the officer testified the other person ran away when he saw the officer (G.J. 3, App. 12; Sup.H. 5, 7, App. 18, 20) or made his way right rapidly (P.H. 7, App. 6), or walked away rapidly (P.H. 9, App. 8) | At other times, the officer merely testified the other person walked away (P.H. 4, App. 3; Sup.H. 15, App. 28); Tr. 29, 33-34, App. 47, 51-52). |
| 12. Attempt at flight-- the defendant | | The officer acknowledged that the defendant made no attempt at flight when the officer was observed,, and walked <u>toward</u> the officer (P.H. 4,9, App. 3,8; G.J. 3, App. 16; Sup.H. 5,8,15, App. 18, 21,28; Tr. 18,34, App. 36,52). |

Perhaps the most damaging testimony given by the arresting police officer on the motion to suppress the narcotic capsules as evidence was his repeated declarations that the small manila-colored envelope was "the envelope that most narcotic people use", that he "did not know of any other use of it" and "had never seen it purchased at a store" (although later conceding at trial that it could be purchased at an ordinary commercial stationery store), and that it was "the standard color and standard size of envelope that is used in that type of traffic" (Sup.H. 4, App. 17; Tr. 35, App. 53).

The fact is that there is not a single reported case in the last 50 bound volumes of the Federal Reporter, Second Series, from 369 F.2d to 418 F.2d, nor in the last 33 bound volumes of the reports of this Court, from 102 U.S. App. D.C. to 134 U.S. App. D.C.; nor in a random sampling of other recent cases, where the Court has made a reference to narcotic capsules in a manila envelope, and very few cases where the description is so ambiguous that it can possibly be interpreted as relating to a package of this character:

| Type of packaging | Cases |
|---|---|
| "small manila envelope" | United States v. Hoskins, 406 F.2d 72 (7th Cir. 1969) (but containing heroin powder, not capsules); United States v. Phillips, 375 F.2d 75 (7th Cir. 1967) (manila envelope containing heroin powder). |
| "packet" | United States v. Ford, 395 F.2d 678 (6th Cir. 1968); United States v. Arterbridge, 374 F.2d 192 (2nd Cir. 1967). |
| "package" | Brown v. United States, 403 F.2d 489 (5th Cir. 1968) (brown package); Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968) (package in a paper bag); Smith v. United States, 385 F.2d 34 (5th Cir. 1967); United States v. Dichiariate, 385 F.2d 333 (7th Cir. 1967) (package containing 1/2 pound heroin); United States v. Nuccio, 373 F.2d 168 (2nd Cir. 1967) (3 kilograms); United States v. Barney, 371 F.2d 166 (7th Cir. 1967); Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968) (4.7 grams heroin). |

| Type of packaging | Cases |
|---|---|
| "silver colored package" | Jackson v. United States, 408 F.2d 306 (9th Cir. 1969). |
| "envelope" | United States v. Myers, 406 F.2d 744 (4th Cir. 1969) (envelope with heroin); Miller V. United States, 120 U.S. App. D.C. 398, 347 F.2d 494 (1964) (brown envelope with powder in it); United States v. Mancusi, 393 F.2d 482 (2nd Cir. 1968); United States v. Tuck, 380 F.2d 857 (2d Cir. 1967) (white envelope containing white heroin powder) |
| "brown paper bag" | United States v. Palmiotto, 347 F.2d 797 (2nd Cir. 1965); Jiminez v. United States, 397 F.2d 271 (5th Cir. 1968); United States v. Dovico, 380 F.2d 325 (2nd Cir. 1967). |
| "brown coffee bag" | United States v. Lawler, 413 F.2d 622 (7th Cir. 1969) |
| "bag" | Garza v. United States, 385 F.2d 899 (5th Cir. 1967) (bag containing heroin) |
| "shopping bag" | Thomas v. United States, 372 U.S. 252 (5th Cir. 1967) |
| "plastic bag" | United States v. Cuadrado, 413 F.2d 633 (2nd Cir. 1969); Cazares-Ramirez v. United States, 406 F.2d 228 (5th Cir. 1969 ) (two plastic bags containing smaller packages of heroin); United States v. Glaziou, 405 F.2d 8 (2nd Cir. 1968) (plastic bags containing 21 pounds of heroin); United States v. Desist, 384 F.2d 889 (2nd Cir. 1967) (plastic bags in walls of freezer) |
| "foil" | Lucas v. United States, 343 F.2d 1 (8th Cir. 1965) (tin foil paper wrapped in tissue paper); United States v. Gardner, 416 F.2d 879 (6th Cir. 1969) (heroin wrapped in aluminum foil); United States v. Spencer, 415 F.2d 1301 (7th Cir. 1969) (foil packet); United States v. Perea, 413 F.2d 65 (10th Cir. 1969) (tinfoil package); United States v. Cuadrado, 413 F.2d 633 (2nd Cir. 1969); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968) (tinfoil wrapped package); United States v. Soyka, 394 F.2d 443 (2nd Cir. 1968), affirmed en banc, 394 F.2d 452 (1968) (tinfoil package); McWilliams v. United States, 394 F.2d 41 (8th Cir. 1968) (5 capsules wrapped in aluminum foil); United States v. Griffin, 382 F.2d 823 (6th Cir. 1967); United States v. |

| Type of packaging | Cases |
|---|---|
| "foil" (cont.) | Wanton, 380 F.2d 792 (2nd Cir. 1967) (tinfoil package); United States v. Faustin, 371 F.2d 820 (2nd Cir. 1967) (tinfoil packets of cocaine); United States v. Phillips, 375 F.2d 75 (7th Cir. 1967) ( heroin powder in aluminum foil). |
| "cellophane" | United States v. Lugo Baez, 412 F.2d 435 (8th Cir. 1969) (cellophane bag); Vauss v. United States 125 U.S. App. D. C. 228, 370 F.2d 250 (1966) (15 cellophane envelopes); Garcia v. United States, 373 F.2d 806 (10th Cir. 1967) (cellophane package containing tinfoil-wrapped capsules of heroin) |
| "glassine" | United States v. Rosa, 343 F.2d 123 (2nd Cir. 1965) (heroin brownish powder in glassine bags); United States v. White, 324 F.2d 814 (2nd Cir. 1963) (two glassine envelopes); United States v. Mato, 417 F.2d 1242 (2nd Cir. 1969) (several glassine envelopes); Spriggs v. United States, 133 U.S. App. D.C. 76, 408 F.2d 1279 (1969) (118 glassine packets); United States v. Llanes, 398 F.2d 880 (2nd Cir. 1968) (heroin powder in glassine envelopes); United States v. Tucker, 380 F.2d 206 (2nd Cir. 1967) (12 grams heroin, capsules and glassine envelopes); United States v. Beltram, 388 F.2d 449 (2nd Cir. 1968) (glassine envelope of cocaine); United States v. Ramsey, 374 F.2d 192 (2nd Cir. 1967) (glassine envelopes) |
| "balloon" | Torres v. United States, 353 F.2d 734 (9th Cir. 1965) (3.47 grams heroin in eight colored rubber balloons); Dawkins v. United States, 323 F.2d 521 (9th Cir. 1963) (heroin in red balloon, passed in a cigarette pack); Stamps v. United States, 406 F.2d 925 (9th Cir. 1969); United States v. Norman, 402 F.2d 73 (9th Cir. 1968) (balloon, packet). |
| "condom"<br>"prophylactic"<br>"contraceptive" | Reyes v. United States, 417 F.2d 916 (9th Cir. 1969) (heroin in two rubber condoms); United States v. Cabrera, 417 F.2d 211 (5th Cir. 1969); 100 grams in a prophylactic covered with a newspaper and placed in a brown paper bag); Nutter v. United States, 412 F.2d 178 (9th Cir. 1969) (condoms); Malagon-Ramirez v. United States, 404 F.2d 604 (9th Cir. 1968) (contraceptive); Murray v. United States, 403 F.2d |

| Type of packaging | Cases |
|---|---|
| "condom" (cont.) | 694 (9th Cir. 1968) (contraceptives); Encinas-Sierras v. United States, 401 F.2d 228 (9th Cir. 1968) (heroin powder in contraceptive in white paper); Juvera v. United States, 378 F.2d 433 (9th Cir. 1967) (condoms containing heroin); Moody v. United States, 376 F.2d 525 (9th Cir. 1967) Garcia v. United States, 381 F.2d 778 (9th Cir. 1967) (condoms containing white substance); Thomas v. United States, 369 F.2d 372 (9th Cir. 1966) (contraceptive). |
| "cigarette package" | Powell v. United States, 374 F.2d 386 (9th Cir. 1967) (heroin powder in folded paper in cigarette package); Haynes v. United States, 386 F.2d 183 (9th Cir. 1967). |
| "rubber gloves" | Garcia v. United States, 373 F.2d 806 (10th Cir. 1967) (capsules in finger of rubber glove). |
| "glove compartment" | United States v. Jamison, 395 F.2d 716 (2nd Cir. 1968) (200 grams). |
| "flight bag" | White v. United States, 394 F.2d 49 (9th Cir. 1968) (blue flight bag, 23 ounces of heroin). |
| "match box" | Davis v. United States, 382 F.2d 222 (9th Cir. 1967) (match box containing heroin). |
| "vial" | United States v. Aldrette, 414 F.2d 238 (5th Cir. 1969). |
| "in shoe", "in ceiling light fixture", in envelope" | Hallman v. United States, 115 U.S. App. D.C. 350, 320 F.2d 669 (1963), cert. den. 375 U.S. 882 (1963). |
| "bottle" | Vick v. United States, 113 U.S. App. D.C. 12, 304 F.2d 379 (1962) (heroin capsules in bufferin bottle). |
| "wrapper" | Willis v. United States, 109 U.S.App. D.C. 221, 285 F.2d 663 (1960). |
| "television" | Jackson v. United States, 102 U.S. App. D.C. 109, 250 F.2d 772 (1957) (heroin hidden in television). |

In the recent case of Turner v. United States, ---U.S.---(No. 190, January 20, 1970), the packages were described as foil, tinfoil, and small double glassine bags with an outer wrapper.

In the colloquy at the hearing on the motion to suppress in which defendant's counsel sought to challenge probable cause and to impeach the testimony of the arresting officer by showing prior inconsistent or contradictory statements, the able and experienced Trial Court appears to have misconceived the scope of the hearing in declaring, "I am concerned only with probable cause." (Sup.E. 10, App. 10). Credibility is part of the issue of probable cause. The testimony of a police officer is not unimpeachable, and is entitled to no greater as well as no lesser weight on a hearing on a motion to suppress than that afforded the testimony of any other witness, cf. Bush v. United States, 126 U.S. App. D.C. 174, 375 F.2d 602 (1967). As with any other witness, his testimony on probable cause is subject to impeachment and to being disbelieved upon a showing of other contradictory or inconsistent statements. This Court observed in Jackson v. United States, 122 U.S. App. D.C. 324, 327-29, 353 F.2d 862, 865-67 (1965) (footnotes omitted):

> "It remains our responsibility * * * to review fact findings and to reject them when we are firmly convinced they are wrong, when the probability of error is too great to tolerate. This involves, in some contexts at least, an evaluation of the credibility of the witness or witnesses upon whose testimony the finding is based. While the trial judge's observation of demeanor must be given appropriate weight, it must be remembered that '[c]redibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.' * * *Thus, to the extent that the

credibility of the police officers in this case turns on their demeanor, we must defer. But that the officers seemed to be telling the truth does not end the matter. A number of other factors often considered in judging credibility must be examined, such as whether the witness was interested in the outcome, his reputation, his degree of recall, the internal inconsistencies in his testimony, and the likelihood of his story.

"A close scrutiny of the record in this case is required because of circumstances which seriously hampered the opportunity of the judge at the hearing on mandate fully to evaluate credibility. The testimony in this case is spread out in three transcripts which were compiled over a nearly two-year period. The serious inconsistencies in the officers' testimony becomes clear only by studying the first transcript and comparing it with the second and third. Significantly, the judge who presided at the trial and at the hearing on mandate did not preside at the first hearing; nor is there adequate proof that he familiarized himself with or considered the transcript of the first hearing. * * *

"Normally, as an appellate court, we accept the testimony of police officers and other witnesses credited by the trial court. But we are not compelled to accept the testimony of any witness. * * * In some cases police testimony, like other testimony, will simply be too weak and too incredible, under the circumstances, to accept."

In this case, the officer's testimony was spread out over two reports by the officer, one report by an investigator, and four transcripts of hearing, the Trial Judge presiding over two of the hearings. Inconsistencies were called to his attention (see Sup.H. 9-10, App. 22-23), particularly at trial (Tr. 25-31, App. 43-49), but although the Trial Court gave the jury the cautionary impeachment instruction at the time (Tr. 28-29, App. 46-47), he presumably did not appreciate the extent or depth of the inconsistencies which a close scrutiny of this record discloses, or the extent to which they impaired his own finding of probable cause (Tr. 54-55, App. 64-65).

The arrest in this case was made without a warrant. The circumstances here were such that it may readily be conceded that a warrant was unnecessary if probable cause existed for the arrest and search. The

fact that there was no warrant, however, affords greater latitude to challenge what the true facts were, to weigh the credibility of the arresting officer, and to test the extent to which the operative facts have become embroidered. This Court also stated in Jackson v. United States, 122 U.S. App. D.C. at 330, 353 F. 2d at 868, at footnote 15 (citations omitted):

> "Of course, if an officer obtained a warrant before making a legal along with an illegal arrest, the detailed information he allegedly received would have been presented to a neutral judicial body and recorded in an affidavit. We might then be compelled to accept the argument that he acted lawfully as to one person and unlawfully as to the other. But where he has not obtained a warrant, has not secured judicial confirmation of his possession of the description and thereby obviated the necessity of any speculation as to the true facts, this failure on his part should operate against acceptance of his testimony. The Supreme Court has stated that the warrantless arrest will be more closely scrutinized than one based upon a warrant. * * * One reason for this may well be the possibility that officers will fabricate evidence after the arrest to justify their acts, and the difficulty of proving such fabrication. It is true that we do not guard against after-the-fact fabrication in all cases by requiring that a warrant be obtained whenever practicable. But this does not preclude us from attaching significance to the failure to obtain a warrant in appropriate cases. If anything, our decision not to impose a blanket rule requires us to scrutinize more closely the testimony in cases involving warrantless arrests."

The contradictions and inconsistencies revealed at the trial, coupled with earlier conflicts in statements of the arresting officer, necessarily required, if not an outright reversal of the earlier ruling and the grant of the motion to suppress, not a summary affirmance but "a fresh determination of the suppression issue" with close scrutiny of the material casting doubt on the earlier ruling, as in Rouse v. United States, 123 U.S. App. D.C. 348, 349-50, 359 F.2d 1014, 1015-16(1966) (footnote omitted);

"A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances. New facts, new light on the credibility of government witnesses, or other matters appearing at trial may cast reasonable doubt on the pre-trial ruling. It then becomes the duty of the trial judge to consider de novo the issue of suppression and, if necessary, hold a hearing out of the presence of the jury.

"The courts are particularly sensitive to new matters concerning a search incident to a warrantless arrest. A warrant requires a before-the-event justification which involves confirmation of legality by a judicial officer. When probable cause appears, a warrant is not required for an arrest in public even where practicable. However, the police, who have the burden of showing that a warrantless arrest was valid, must take all reasonable steps to assure that their testimony accurately reflects what occurred. And the courts 'must scrutinize more closely the testimony in cases involving warrantless arrests.'

" * * *

"Then at trial came Officer Jenkins' explanation that he had been confused. * * * At the very least, the Officer's explanation amounted to an admission of carelessness and confusion at the suppression hearing. * * * We think his explanation, which stirred previous doubts and raised new ones, reasonably required inquiry and a fresh determination of the suppression issue. * * *"

The "probable cause" to support an arrest in this case involved not the testimony of a callow "rookie" police officer or some casual wayfaring lay spectator, but the observations of a trained veteran police officer.

Officer Williams had been with the Metropolitan Police Department going on eleven years. (Sup.H. 10, App. 23). He was assigned "to pay strict attention" to the "lot of vice that went on" in that area. (Sup.H. 7 , App. 20). He had allegedly made "numerous narcotic arrests" in his career on different assignments, with the assistance of narcotic squad officers (Sup. H. 13, App. 26). As an officer, he had been instructed on the necessity for making complete and accurate reports. (Tr. 25, App. 43).

A single instance of variation might be explainable as a mental lapse; the multiplicity of variances in his various statements makes the testimony of the police officer in support of probable cause intrinsically and inevitably incredible. This Court said, in Jackson v. United States, 122 U.S. App. D.C. at 329, 353 F.2d at 867 (footnotes omitted):

> "* * * [Various important] inconsistencies contribute to our conviction that the credibility of [the officer's] testimony was questionable at best.
>
> "Our conviction that [the officer's] testimony should have been discredited, however, is primarily based on the fact that it contains internal contradictions and is contrary to human experience. The doctrine that appellate courts must reverse findings based upon 'inherently incredible' testimony has long been accepted in this jurisdiction. Sometimes, it is possible to disprove testimony as a matter of logic by the uncontradicted facts or by scientific evidence. [Citations.] But the doctrine of inherent incredibility does not require such positive proof. It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge, or behaved in a manner strongly at variance with the way in which we would normally expect a similarly situated person to behave."

In this case, we would normally expect that an experienced, trained officer would have recognized, and constantly and consistently described with precision and specificity, the most important elements going to support probable cause for arrest. Thus, for example, it is incredible that this officer would have merely described what was in defendant's hand as "something" until the time of the suppression hearing, if he had in fact observed the "something" to be capsules; or that he would have merely said at times that the other person "walked" away if in fact he had run away, or had moved away so rapidly as to constitute flight; or that he would have

been so variable in estimating the distance from which he observed the defendant; or that he would have been so casual whether he had received information on narcotics traffic in the area; or that he would have been so inconsistent (and inaccurate) on the general availability and use of small manila-colored envelopes; or that he would have been so careless in distinguishing between what he actually saw happen and what he speculated was about to happen in testifying whether the defendant was handing anything to the other person.

The conclusion is compelling that all that the arresting police officer actually did see was the defendant shaking "something" into his own hand from an ordinary small envelope (which could have been candy, or the candy-coated peanuts which come in a small yellow wrapper, or small coins, or any number of objects), and that the additional elements which might go to support a finding of probable cause were merely the product, at most, of suspicion, conjecture, and subsequent embellishment. It is submitted that the facts which can be accepted as the actual observations of the officer were clearly inadequate to sustain a finding of probable cause.

An arrest and search, of course, do not become justified by what they turn up. Byars v. United States, 273 U.S. 28,29 (1927). This case has significance not only for its consequences to the defendant, but also as a guide to other officers under comparable conditions. Under the circumstances of the arrest here made, it was essential that probable cause had been fully present at the time of arrest to insure the likelihood that the defendant feloniously possessed narcotics drugs. The arrest was here made on a Saturday evening after 9:00 p.m. (Sup.H. 3, App. 16). A large crowd of men were gathered around the corner of Fifteenth and East Capitol Streets when the arrest was made (Sup.H. 4, App. 17), no fewer than 25 in number (P.H. 4, 5, App. 3, 4 ). The

crowd gathered around the officer when the arrest was made (Sup.H. 5, App. 18). To make the arrest and search under these circumstances upon probable cause would be courageous and, if not otherwise dangerous, highly commendable. To make an arrest and search under these circumstances without probable cause, with the danger of arresting an innocent person, would be not only foolhardy and fraught with peril, but a grave disservice to public peace. The recent history of civil disorders in this Nation discloses an unfortunate ominous resentment in some areas toward police officers, and the role that challenged street arrests have played in triggering major disturbances. See, e.g., the Report of the National Advisory Commission on Civil Disorders (the Kerner Report) (1968). It is not alone for the benefit of individuals who may be the object of an unreasonable search and seizure, but it is also in the interests of domestic tranquillity and the avoidance of unnecessary exacerbation of local hostilities, that it is imperative that an arrest and search and seizure made under these conditions proceed only upon probable cause, upon at least a reasonable likelihood that the party arrested has actually been engaged in the commission of a crime.

Under all the circumstances of this case, it is respectfully submitted that the arresting police officer did not here have probable cause to believe that the defendant was engaged in dealing in contraband narcotics; that the arrest, search and seizure were accordingly illegal; and the fruits of the illegal arrest, search, and seizure should accordingly have been suppressed.

II. The Trial Court Erred in Refusing to Permit Cross-Examination of an Expert Government Witness on the Habitual Daily Use of an Addict

At the time of defendant's arrest, Officer Andrew A. Johnson had been assigned to the narcotics section of the Metropolitan Police Department for two and one half years "to conduct investigations relative to narcotic activity in the District of Columbia" (Tr. 36-37, App. 54-55). He was called as a witness for the Government (Tr. 36, App. 54), and on cross-examination testified that he had become fairly familiar with the habits of narcotic addicts. The Trial Court then sustained an objection by the Government to the next question on cross examination: "Q. Based upon your own experience, how long do you think it would take an addict to use the 36 capsules of heroin?" The response which had been anticipated was that the 36 capsules constituted approximately one day's supply for an addict. Cf. Watson v. United States (U.S. App.D.C. No. 21, 186, December 13, 1968), unreported, rehearing en banc pending ("The evidence showed that at the time of his arrest he was in possession of thirteen capsules containing heroin--half the amount of his habitual daily use").

The defendant was indicted under Counts 1 and 3 charged with violations of Title 26, Section 4704(a), of the United States Code, which provides:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Although the statute reaches four types of transactions, the defendant was indicted under Counts 1 and 3 only of three types of transactions, that he "purchased, dispensed and distributed",not sold. The defendant was indicted under Count 2 charged with violation of Title 21, Section 174, of the United States Code, which provides in part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * *, shall be imprisoned * * *.
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The evidence under this Court apparently gave the jury some difficulty, since it requested during its deliberations that the Court clarify the meaning of "concealment" as well as "imported into the United States contrary to law with the knowledge" (Tr. 81, App. 68).

In the recent case of Turner v. United States , --U.S.-- (No. 190, January 20, 1970), the Supreme Court upheld the presumptions with respect to heroin that the mere possession of heroin is sufficient evidence to justify conviction under both statutes. Possession, however, is only prima facie evidence of the violation of 26 U.S.C. § 4704(a), and it only authorizes --but does not require--conviction under 21 U.S.C. § 174;i.e., under neither statute is the presumption conclusive. The Supreme Court stated in Turner v. United States, slip opinion p. 8, fn. 8 (citations omitted):

> "Arguably, in declaring possession to be ample evidence to convict for trafficking in illegally imported drugs, Congress in effect has made possession itself a crime as an incident to its power over foreign commerce. * * * But the crime defined by the statute is not possession and the Court has rejected this basis for sustaining this and similar statutory inferences. * * *"

The Court recognized that the possession inference might be challenged not only directly by the defendant's own testimony, but also indirectly, by, for example, Government expert witness testimony, slip opinion, p. 10:

> " * * * Hence, if he is to avoid conviction, he faces the urgent necessity either to rebut or to challenge successfully the possession inference by demonstrating the fact or the likelihood of a domestic source for heroin, not necessarily by his own testimony but through the testimony of others who are familiar with the traffic in drugs, whether government agents or private experts."

Obviously, the possession inference may be rebutted not only by indicating a likely domestic source for heroin, but also by challenging the other presumptions flowing from possession, e.g., that there was a purchase, dispensing, or distribution under 26 U.S.C. § 4704(a), or a concealment and knowledge of illegal importation under 21 U.S.C. § 174.

The question concerning the habitual daily use of an addict was designed to reach those issues in the proceeding. The Government witness was permitted to testify without objection that he had become fairly familiar with the habits of narcotic addicts, so that his expert qualification as a witness to respond to the next question was established. If the jury had been permitted to hear his expected testimony, that the heroin was one day's habit for an addict, it might well have concluded that the capsules were in the defendant's possession for his own use:

1. Under 26 U.S.C. § 4704(a), the thrust of the Government's evidence was that the defendant was seeking to dispense or distribute the capsules to another person. In Turner, the jury could readily infer distribution and dispensing, because the defendant was in possession of some 275 glassine bags of heroin, solidly establishing that the defendant's "heroin" was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute, "slip opinion, p. 21. The Court did also say that the act of possessing the heroin was also sufficient proof from which the jury could find the defendant had purchased the heroin, even if it did not find he was distributing the narcotic drug: "Since heroin is a high-priced product [footnote: "Heroin is reported to sell for around $5 per'bag' or packet"], it would be very unreasonable to assume that any sizable number of possessors had not paid for it, one way or another." Slip opinion, p. 22. But if the product seized was not of high value (in Turner, the heroin package weighed 48.25 grams, of which 15.2% was heroin, slip opinion, p. 1; in this case, the heroin package weighed only 2.252 grams, with only a 10% heroin content), and if the jury could have been apprised that this was only one day's habit, then it is submitted that it could well have determined that this amount of heroin might have been obtained from some source other than by purchase.

2. In any event, under 26 U.S.C. § 4704(a), the focus of the jury's attention was on dispensing and distribution, and it might therefore well have concluded, had the evidence been permitted to be adduced, that the defendant was an addict and could not have been dispensing and distributing because it was only sufficient for his own habit (particularly in light of the contrary natural assumption, without this testimony, that 36 capsules of 2,252 milligrams was a horrendous amount). And certainly the attitude

toward the defendant of the jury as a segment of society is greatly influenced by the circumstance whether an accused is an addict or a peddler of small or large quantities of narcotic drugs.

3. The opportunity to elicit this information from the Government's witness was even more essential under Count 2, because the defendant received a much heavier sentence under this Count (the sentences to run concurrently), and because it carries much severer minimum penalties. The thrust of the Supreme Court's decision upholding the conviction on the heroin count under 21 U.S.C. §174 in the Turner case turned on the knowledge of its illegal importation which the defendant must have had because of his trafficking in the drug, slip opinion, p. 17 (footnotes omitted):

> "It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart. Such people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. * * *"

Had the jury known that the defendant, when searched, carried only a one day's supply of the heroin, it might well have concluded that the defendant was not a trafficker in drugs and was less likely to have knowledge that the drug was illegally imported. A footnote in the Turner decision, slip opinion, p. 18, fn. 33, suggests that a conclusion of knowledge "is also justified with regard to those users and addicts who frequently purchase supplies of heroin on the retail market." Even if the conclusion may be "justified", it is not mandatory, and it is submitted that the jury had the right to be apprised of the significance of 36 heroin capsules as an important circumstance in reaching a conclusion whether there was guilty knowledge of illegal importation. The inquiry of the

jury during its deliberations clearly indicated that the issue of guilty knowledge gave the jury difficulty in reaching its verdict.

4. The inquiry of the jury also showed that the question of concealment under 21 U.S.C. § 174 gave the jury difficulty. If the jury had been permitted to be informed that the heroin capsules were one day's supply, it might well have concluded that the defendant was not concealing or facilitating the concealment of the drug becasue he had less reason to do so when the amount is not as large as the number of capsules might indicate, particularly since he was arrested while shaking the capsules into his hand, not concealing the capsules.

The jury may, of course, have convicted on the presumption that the mere fact of possession showed a prior purchase under 26 U.S.C. § 4704(a) and knowledge of illegal importation under 21 U.S.C. § 174. But it may not. It may have assumed that 36 capsules were of so large a quantity that they could not possibly have been for his own use, and therefore defendant was a trafficker in drugs who was dispensing and distributing under 26 U.S.C §4704(a) and necessarily had the guilty knowledge of illegal importation under 21 U.S.C. §174. Under these ambiguities, it is not clear on what basis the jury returned its general verdict of guilty.

In the analogous case of United States v. Romano, 382 U.S. 136 (1965), the Supreme Court reversed a conviction for illegal possession of a still, even though there was sufficient evidence, in addition to presence at the still, to support possession, because the jury was also incorrectly instructed that presence was sufficient to show possession; it was held to be reversible error because the jury may have disregarded or disbelieved the other evidence of possession, and relied upon the erroneous instruction in convicting.

382 U.S. at 138-39. Likewise, in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), the Supreme Court refused to inquire whether there was sufficient evidence to convict the defendant without the evidence complained of, and said the case must be reversed where "there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

Defendant contends, whether or not the statutory presumptions flowing from possession were adequate to convict, that there is a reasonable possibility, at the least, that the exclusion of evidence on the number of capsules used daily by an addict might well have influenced the jury to convict where it might otherwise not have done so, and therefore the case must be reversed for the refusal to permit the defendant to pursue this line of cross examination.

III. The Conviction Arising From the Possession of Cocaine Under Count 3 Should Be Vacated

The defendant was convicted by jury trial on December 18, 1969, the Court charging (Tr. 74, App. 67):

> "* * *[I]f the Government has proved beyond a reasonable doubt by direct evidence the defendant had possession of the narcotic drugs specified in the indictment and that the revenue stamps were absent from the narcotic drug, and while in the defendant's possession, you may if you see fit to do so, infer from these facts alone that the defendant is guilty of this offense."

This charge no longer states the applicable law with respect to cocaine, the subject of Count 3 of the indictment, under the decision of the Supreme Court one month later in Turner v. United States, --- U.S. --- (No. 190, January 20, 1970). The Supreme Court has now ruled that the bare possession of cocaine, which is legally manufactured in this country, is an insufficient predicate to conclude that a defendant was dispensing, distributing,

or purchasing cocaine (the three types of transactions enumerated in Count 3 of this case). The defendant in this case did not dispense or distribute the cocaine, because the cocaine was found in his possession, at most he was seen shaking out something (not necessarily the cocaine capsules) into his own hand, and the capsules never left his possession. Since 14.68 grams of a cocaine and sugar mixture was considered in the Turner case so small a quantity that it was consistent with the defendant's possessing the cocaine not for sale but exclusively for use, a fortiori the possession of 1.594 grams of a cocaine mixture in this case was inadequate to permit the statutory presumption of guilt to arise from possession.

Although the sentence under Count 3 was made concurrent with those to be served under Counts 1 and 2, the concurrent sentence doctrine of Hirabayashi v. United States, 320 U.S. 81, 105 (1943), is no longer a jurisdictional bar to consideration of the count on its merits because of the possibilities of adverse collateral effects, Benton v. Maryland, 395 U.S. 784 (1969), particularly in light of the harsh penalties of the narcotics laws.

If the Court is not disposed, despite the ruling on the cocaine statutory presumptions in Turner v. United States, forthwith to reverse and remand with directions to enter a judgment of acquittal, the recent decision of the Court in United States v. Hooper (U.S. App.D.C. No. 22,545, March 6, 1970), suggests an appropriate disposition, slip opinion, page 6:

> "Hirabayashi may still have useful application when the concurrent conviction is not really doubtful yet does not warrant the additional time required for opinion-writing, or perhaps where collateral adverse consequences can be definitely ruled out. Where there is doubt of the concurrent convictions the sound course, we think, is either to determine the matter on the merits, as in Benton, or to vacate the sentence because of the overall interest of justice in effective disposition of appellate dockets, at least where there is neither injustice done defendant nor a need of the government overriden. * * *"

## CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Appellant respectfully prays:

1. That the Court reverse the judgment of conviction of the three Counts of the indictment, and remand the case to the District Court with directions to enter a judgment of acquittal, or for a new trial, on some or all of the counts.

2. That the Court rule that defendant's motion to supress evidence unlawfully seized from his possession should have been granted, or remand this case for a fresh determination on defendant's motion to suppress.

3. That the Court vacate the judgment of conviction on Count 3 of the indictment, and direct a judgment of acquittal.

4. That the Court grant such other and further relief as to this Court may seem just and proper in the premises.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,002

UNITED STATES OF AMERICA, APPELLEE

*v.*

VINCENT B. WALKER, APPELLANT

Appeal from the United States District Court
for the District of Columbia



THOMAS A. FLANNERY,
*United States Attorney.*

JOHN A. TERRY,
DAVID C. WOLL,
CHARLES H. ROISTACHER,
*Assistant United States Attorneys.*

Cr. No. 1091-69

# INDEX



## TABLE OF CASES



## OTHER REFERENCES



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* Cases chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court's acceptance of Officer Williams' testimony was clearly erroneous?

II. Whether Officer Williams had probable cause to arrest appellant?

III. Whether the trial court's refusal to allow appellant to cross-examine the narcotics officer on the daily drug intake of an addict was prejudicial?

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* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,002

---

UNITED STATES OF AMERICA, APPELLEE

*v.*

VINCENT B. WALKER, APPELLANT

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

By a three-count indictment filed July 8, 1969, appellant was charged with various narcotics violations[1] occurring on or about April 26, 1969. A motion to suppress the narcotics was denied on November 7, 1969, by the Honorable John Lewis Smith, Jr. On December 18, 1969, before Judge Smith and a jury, appellant was tried and found guilty on all three counts. On February 11,

[1] Counts one and three charged appellant with violating 26 U.S.C. § 4704 (a) with respect to thirty-six capsules of heroin and sixteen capsules of cocaine, respectively. Count two charged him with violating 21 U.S.C. § 174 with respect to the same heroin mentioned in count one.

1970, appellant was sentenced to imprisonment for one to three years on each of counts one and three and six years on count two. All the sentences were made to run concurrently. This appeal was noted the same day.

On April 26, 1969, Officer Samuel Williams of the Metropolitan Police was on "foot beat" [2] in Northeast Washington (Tr. 15-16).[3] At about 9:20 p.m., while near the intersection of East Capitol and Fifteenth Streets, he observed appellant in the company of another "shaking out of some yellow envelope,[4] some capsules" (Tr. 17, 25, 33). Williams testified that appellant's companion "turned and walked away or ran away" when he saw the officer (Tr. 18, 29, 33-34). Williams then observed appellant place the capsules back in the envelope and put it into his right jacket pocket (Tr. 18, 34). Appellant then picked up a Coca-Cola bottle and advanced towards Williams (Tr. 18, 34). Williams asked appellant what he had in his right coat pocket. Appellant pulled out "some matches and some crumpled up cigarettes" and asked "what was this all about." Appellant was then placed under arrest for possession of narcotics (Tr. 18). A search of his right coat pocket revealed two envelopes; one contained thirty-six capsules, the other sixteen. All capsules contained a "narcotic substance" (Tr. 18-19). Neither the envelopes nor the capsules bore tax stamps (Tr. 23). On the same date Williams initialed these

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[2] At the pre-trial hearing on the motion to suppress Officer Williams testified that the area of his beat, "East Capitol Street to Fifteenth Street and back down to D Street" (Tr. 16), was plagued with "vice" (Supp. 7, 12) and narcotics traffic (Supp. 12-13).

[3] "Tr." refers to the transcript of appellant's trial; "Supp." refers to the suppression hearing transcript; "P.H." refers to the preliminary hearing transcript; and "G.J." refers to the grand jury transcript.

[4] At the hearing on the motion to suppress, Officer Williams testified that this envelope was "one of the little narcotic bags that narcotic people use . . . . This is the envelope that most narcotics people use. I don't know of any other use of it. In all my career, this seemed to be the standard envelope that narcotic people use." (Supp. 4.)

envelopes and gave them to Officer Johnson of the Narcotics Squad (Tr. 20, 22).

Plainclothesman Andrew A. Johnson testified that on April 26, 1969, he was assigned to the Narcotics Section of the Metropolitan Police. After receiving a radio run to meet Officer Williams, he responded to the Ninth Precinct and was given two envelopes by Williams. One envelope contained thirty-six capsules, and the other contained sixteen. All were filled with a white powder. Johnson dated and initialed these envelopes and performed a preliminary field test on the contents of one of the capsules at the Narcotics Squad office. The result of this test was a "positive color reaction indicating the presence of a narcotic drug of the opium group." Johnson then placed the two envelopes in a "Treasury Department lock-sealed envelope . . . and locked it into my desk." On May 2, 1969, Johnson delivered the lock-sealed envelope to Mr. John A. Steele, a United States chemist (Tr. 36-42).

Mr. Steele, an analytical chemist for the Internal Revenue Service, testified that he received a lock-sealed envelope from Detective Johnson on May 2, 1969. He initialed this envelope, removed its contents (two cream-colored envelopes), and performed a chemical analysis on the contents of the capsules inside. He found the thirty-six capsules to contain ten percent heroin hydrochloride. The sixteen capsules in the other envelope contained twelve percent cocaine hydrochloride (Tr. 48-49). All envelopes and capsules seized from appellant, as well as the lock-sealed envelope, were admitted into evidence at appellant's trial (Tr. 54).

Appellant presented no evidence. His renewed motion to suppress and motions to dismiss the indictment and for judgment of acquittal were all denied (Tr. 54-55).

## ARGUMENT

### I. The asserted discrepancies in Officer Williams' testimony do not make the trial court's acceptance of that testimony clearly erroneous.

(Tr. 17, 27-31, 55) (Supp. 4, 5-10, 15-18)
(P.H. 4, 7, 9) (G.J. 2)

Appellant argues that the trial court committed error in admitting the narcotics seized from his person because Officer Williams lacked probable cause to arrest him. The thrust of his argument against probable cause centers around alleged contradictions and inconsistent statements made by the officer in respect to the operative facts surrounding appellant's arrest. Appellant says that because of these claimed inconsistencies Williams' credibility was so impaired that the court could not have found probable cause. We disagree.

The inconsistencies of which appellant speaks are minor. They deal with (1) Williams' distance from appellant, (2) his place of observation, (3) whether he observed appellant removing capsules or just "something" from an envelope, (4) whether anything passed from appellant to another party, and (5) the method and speed by which appellant's companion fled the scene (Brief for Appellant, pp. 12-15). By way of impeachment, they were brought to the attention of the trial court at the pre-trial hearing on the motion to suppress (Supp. 9-10) and at trial (Tr. 27-31, 55). Aware of the alleged inconsistencies, the court nevertheless credited Officer Williams' testimony and found probable cause (Supp. 18, Tr. 55). This credibility judgment should be honored by this Court unless clearly erroneous. *United States* v. *McNeil*, D.C. Cir. No. 22,360, decided October 31, 1969; *Green* v. *United States*, 128 U.S. App. D.C. 408, 389 F.2d 949 (1967) (*en banc*); *Dillane* v. *United States*, 127 U.S. App. D.C. 377, 384 F.2d 329 (1967); *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965).

In *Jackson, supra*, this Court reversed a narcotics conviction, holding that the trial court's finding of probable cause based on the testimony of a police officer was clearly erroneous because that testimony was inherently incredible and contrary to human experience. The officer testified on three different occasions, and each time he gave an *entirely different* reason for arresting and searching Jackson and a companion. In addition, the informant the police claimed to have used in support of Jackson's arrest denied giving the information to the arresting officer. In the instant case, however, the facts do not warrant a determination by this Court that the trial court's assessment of credibility was clearly erroneous. A look at the asserted inconsistencies supports our position.

(1) While Williams slightly changed his testimony in reference to the distance from which he observed appellant, we must realize that Williams could only have been estimating the distance. Certainly a police officer is not required to be mathematically precise when on the street observing a suspected narcotics transaction. At trial he was more certain that the distance was five to ten feet rather than fifteen or fifteen to twenty because he had "been back to that scene on many occasions" (Tr. 31).

(2) Williams' testimony in reference to his position when first observing appellant is without material discrepancy. At the preliminary hearing he testified that he observed appellant while he (Williams) was "alongside a building" (P.H. 4). Before the grand jury he testified that he observed appellant in a "doorway at the entrance of Fifteenth and East Capitol Street" (G.J. 2). At the hearing on the motion to suppress Williams testified that he positioned himself by a wall at Fifteenth and East Capitol and observed appellant in a doorway (Supp. 4). We fail to see any serious variance in this testimony.

(3) On three separate occasions Williams testified that he observed appellant shaking capsules out of an envelope (G.J. 2, Supp. 13-14, Tr. 17). At the preliminary hearing he referred to the capsules as "something out of

the little envelope he was holding" and did not mention the word "capsule" (P.H. 4). This is not an inconsistency because Williams was never asked at the preliminary hearing if he knew what the "something" was.

(4) [redacted] Williams' testimony in reference to the passing of capsules is likewise without serious discrepancy. When Williams testified that appellant was "intending to give" the capsules to the other person (Tr. 17) or that he "was handing" what was in his hand to the other person (Supp. 4-5), he quite obviously was drawing an inference as to what appellant was doing. This in no way contradicts Williams' testimony that the capsules never were actually received by appellant's companion (Supp. 14-16).

(5) Williams' testimony as to the method and speed by which appellant's companion fled the scene is also basically consistent. Whether he walked rapidly or ran, it is clear that this third party exited the scene with haste (G.J. 3, Supp. 5, 7, 15, P.H. 7, 9).

Appellee submits that none of these alleged discrepancies, singly or all together, shed such doubt on Williams' credibility that the acceptance of his testimony by the trial judge was clearly erroneous. This Court should therefore follow the general rule that "normally as an appellate court, we accept the testimony of police officers and other witnesses credited by the trial court." *Jackson* v. *United States*, *supra*, 122 U.S. App. D.C. at 328, 353 F.2d at 866.

**II. The officer had probable cause for appellant's arrest.**

(Supp. 4-14)

Since appellant raises the issue of probable cause in general terms, a short consideration of the facts supporting appellant's arrest seems in order. Williams had been a police officer for eleven years at the time of appellant's arrest (Supp. 10) and had made "numerous narcotic arrests" in his career (Supp. 13). He had received information that the area in which he arrested appellant

was one of "high crime and vice" (Supp. 7, 12). He observed appellant and another standing in a doorway at Fifteenth and East Capitol Streets. He then observed appellant remove some capsules (Supp. 8, 13-14) from the "standard envelope narcotic people use" (Supp. 4). Appellant was about to hand the unknown man the capsules when the latter observed Williams and fled. Appellant then put the envelope in his pocket and started to approach Williams. Williams asked appellant to stop and inquired as to what appellant had placed in his pocket. Upon appellant's removing matches and a half pack of cigarettes from the pocket, and upon appellant's becoming "very boisterous and disorderly," Williams placed him under arrest and removed the envelope containing narcotics from appellant's right pocket (Supp. 5-6).

When Williams saw appellant in the process of apparently distributing capsules from an envelope of a type which he immediately recognized as associated with narcotics, he had reason to believe appellant was guilty of violating the Harrison Narcotics Act. Probable cause is a reasonable ground for belief in guilt. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925). It "is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962). Indeed, "an officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the *appearance of paraphernalia* which to the lay eye is without significance." *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958) (emphasis added). Officer Williams recognized appellant's envelope as one in which narcotics were usually kept, and the sight of the capsules and the flight of appellant's companion gave additional support to his conclusion as to what that envelope contained. His arrest of appellant was therefore lawful, and the narcotics seized from his person were admissible at trial.

**III. The trial court's refusal to allow appellant to cross-examine a narcotics officer on the "daily use" of an addict was not prejudicial.**

(Tr. 23, 43)

Appellant argues that because the trial court refused him permission to ask Officer Johnson of the narcotics squad the daily intake of an addict, he was denied the opportunity to show the jury that the narcotics seized from him were for his own use. He contends that had the jury known the daily intake of an addict, such knowledge might have vitiated the presumptions from possession in both 21 U.S.C. § 174 and 26 U.S.C. § 4704 (a).[5] In light of *Turner* v. *United States*, 396 U.S. 398 (1970), we submit that such proof would be irrelevant to the issues before the jury.

*Turner* not only upholds the presumption operative in 21 U.S.C. § 174 as to heroin, but it disposes of appellant's argument. Appellant was found in possession of thirty-six capsules of heroin. Heroin is not produced in this country, and any found in the United States must have been illegally imported. The jury was therefore perfectly correct to infer that appellant possessed smuggled heroin. *Turner* v. *United States*, *supra*, 396 U.S. at 408-416.

Possession of smuggled heroin by itself, however, is not enough for conviction under 21 U.S.C. § 174. Appellant must have known the drug was illegally imported. He was found to possess thirty-six capsules of heroin and sixteen capsules of cocaine. From the fact that he was

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[5] 21 U.S.C. § 174 provides in pertinent part:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. § 4704 (a) provides in pertinent part:

> [T]he absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found.

observed displaying his contraband to another, the jury could quite reasonably have found him a distributor of heroin. He, like

> Turner and others who sell or distribute heroin are in a class apart. Such people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. The price, supply, and quality vary widely; the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad. The facts concerning heroin are available from many sources, frequently in the popular media. "Common sense," *Leary* v. *United States*, [395 U.S. 6, 46 (1970),] tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled. We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one. *Turner* v. *United States*, *supra*, 396 U.S. at 416-417.

Even if the jury only found appellant a user rather than a distributor, the conclusion that he knew the heroin was illegally imported is still valid. *Turner*, *supra*, 396 U.S. at 417 n. 33.

Since the jury was entirely justified in finding appellant's heroin illegally imported with his knowledge, our only other question is whether he "received, concealed and facilitated the concealment" of the capsules. "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner*, *supra*, 396 U.S. at 420. Appellant was found in possession of the drug and was observed concealing it in his pocket. If he had possession of the heroin, he must necessarily have received it.

Neither the envelope found in appellant's pocket nor the heroin contained therein contained tax paid stamps (Tr. 23). Since *Turner* tells us that the presumption in 26 U.S.C. § 4704 (a) is valid, the jury could therefore conclude that the heroin was not in the original stamped package. Indeed, "[t]he act of possessing is itself sufficient proof that the possessor has not received it in or from the original stamped package." *Turner, supra,* 396 U.S. at 421. With this in mind, we need only find that appellant "purchased, dispensed and distributed" the drug. Here again this Court need only find sufficient evidence with respect to any one of the acts charged to sustain the jury verdict. *Id.* at 420. Even if the evidence introduced at trial did not point to the conclusion that appellant dispensed or distributed the drug, it is reasonable to infer that the jury believed appellant purchased the heroin.

> Since heroin is a high-priced product, it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. *Turner, supra,* 396 U.S. at 422.

In view of the foregoing, the trial court's exclusion from evidence of testimony concerning the daily drug intake of an addict was properly within his discretion and in no way prejudiced appellant.

## CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed as to counts one and two, and vacated as to count three.[6]

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[6] In light of *Turner* v. *United States*, *supra*, we raise no objection to a vacating of appellant's conviction under count three of his indictment.

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